THE PERMANENT COURT OF INTERNATIONAL JUSTICE

Special Foreign Correspondence

THE OUTSTANDING features of the Permanent Court of International Justice, as recommended to the Council of the League of Nations, at San Sebastian, by the Jurists' Advisory Committee, which met at The Hague from June 16 to July 24, are that the new court will be always ready and open for cases; that it will consist of permanent judges, to allow the development of a strong judicial precedent; that it will have the right of obligatory adjudication in a strictly defined field of cases of law; and that it will base its decisions, not upon compromise and adjustment, but solely upon law and fact. The project is a most intricate and carefully balanced adjustment of the conflicts between the big powers and the little powers, between the extremists and the moderates, between those who wanted to give the court all power and those who hesitated to give it too much, between those who looked at it largely from a theoretical point of view and those who recognized that the first essential was to prepare a plan which would be accepted by the nations.

The most vital question after that of the selection of judges is as to the jurisdiction of the new court. Obviously, of course, it would be competent to decide all cases voluntarily brought to it by the parties or referred to it by advance agreement in special treaties. Beyond this, however, should there be any general classes of cases which by their very nature must be submitted to it? In other words, should the court have the right of judgment in any cases whatsoever, even if a State may not have recognized its competence in that particular case? This question went straight to the root of the whole problem, for if the court were to have no power of compulsory adjudication, it might soon languish for lack of work, while, on the other hand, if it were given compulsory adjudication over too wide a field the nations would refuse to approve its formation.

The past, as it happens, is rich with suggestions along this line. At one end they show the gradual clarification of the field of cases which nations agree should be submitted to obligatory adjudication, while at the other they illuminate the great danger of trying to make this field too wide. Between the field of cases generally accepted as suited for compulsory adjudication and the danger line where States have feared a threat to their sovereignty, it has been possible to choose a middle ground, considerably extending the principle that disputes of law between nations shall go automatically before a court of law for decision.

The danger of attempting a too radical advance has been twice illustrated. Great Britain refused to ratify the Prize Court Convention in 1907 because the principles to be applied by the court were stated to be those of law and equity, and the House of Lords could not satisfy itself that there were any such principles generally recognized in cases of prize. Similarly, the general arbitration treaties which President Taft negotiated with Great Britain and France failed because the Senate felt that the term "justiciable" disputes was wholly too vague and ill-defined.

But, if the nations have proved loathe to go the whole way toward obligatory arbitration, they have, nevertheless, gone a considerable distance. Gradually, through the years, the proper limits of this field have tended to clarify. The Hague conferences made a start; the scores of arbitration treaties which followed in their wake carried the principle a little further; and even the defeat of the prize court and the Anglo-Franco-American agreements served the useful purpose of clarifying the difficulties. Finally, a definition prepared by Lord Bryce and others and urged by Elihu Root after the Draft Covenant of the League of Nations had been made public was included as Article 13 in the final draft and accepted by the nearly twoscore nations which have since entered the League.

This definition thus became international law. It recognized the desirability of obligatory arbitration for four classes of cases of law, namely, disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which, if established, would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach.

This was an absolutely safe ground on which to build the new court. No doubt could be felt but that within this limited field the nations were committed to obligatory arbitration. The field, of course, is not a vast one, but nevertheless its formal acceptance is felt to mark a very valuable step forward which all nations will gladly take.

In the future, then, any State would have the right to take a legal question involving any of those points to a permanent court of law for obligatory decision. As the other nations would have agreed to this procedure in advance, it would only be necessary for the complainant State to notify the court, which in turn would notify the other State and the members of the League. The State complained against would be under the obligation to appear in court, and if it did not do so, the court would be free to proceed with the hearing of the case and the handing down of the judgment. At the end, the world would be left in no doubt as to which State was in the right.

After the competence of the court comes the problem of the law to be applied. It is desired to give the widest possible definition to this law in order to afford the court as many avenues to the solution of disputes as have been generally accepted by the nations, without at the same time creating the fear that the court would be free to write its own law as it felt necessary.

Consequently, four categories of law would be applied in order. First, of course, would be any international agreements, whether general or special, which had been adopted by the States in dispute. Failing that, the court would be guided by any international custom which, as the recognized practice of nations, has become accepted as law. Failing that, in turn it would apply the general principles of law recognized by civilized nations, and finally any judicial decisions or opinions common to the most eminent jurists of the different countries.

Next arises the very difficult question as to whether a nation should or should not have a judge of its own nationality on the court whenever its interests are in-

volved. Several different situations might arise: First, a case where at the outset all parties had judges of their nationality on the court; second, a case where one State had such a judge, but the other State did not; and, third, a case where neither had.

Two decisions were possible: Either a judge might be debarred from any case where the interests of his own nation were involved, or provision might be made to have a judge of the nationality of both parties seated on the court.

It was decided to be undesirable to exclude a judge from a case where the interests of his nation were involved, first, because such exclusion would, in a sense, be a reflection on his impartiality, but still more important, because it would remove from the deliberations of the court the man best qualified to explain the law and the point of view of the particular State concerned, and to advise the court as to the best way to handle the decision.

On the other hand, if such a judge were not to be debarred from the court, it would certainly be in the interests of justice to provide that both parties before the court should have a national sitting as a judge. Consequently, if a State appearing before the court does not happen to have a judge on the bench, either the judge of the same nationality among the supplementary judges would be given a seat or, if there were no such supplementary judge, the State would be privileged to name a special judge for the occasion.

Another most important problem is the status before the court of nations not members of the League, for the court has been made possible only by the existence of the League of Nations machinery, is supported entirely by League funds and prestige, and draws its greatest source of strength from the mutual agreements binding together the members of the League. Nevertheless, as the prime purpose of the League is to avoid war, it has been recommended that States not members of the League should be allowed to use the court on special terms.

Here a distinction is made between States mentioned in the Annex to the Covenant, but not yet entered into the League, such as the United States, and States which have not yet been invited to join the League, such as the ex-enemy countries. For the former the court would be open on the same terms as to States in the League, provided that in the particular case involved the obligations of the Covenant, as provided in Article XVII, were accepted and the proportional share of the expenses paid. For the latter class of State the court would be accessible, but without giving full standing as regards the appointment of a special judge and in other details.

Cases before the court would be attended by a large degree of publicity. The moment a case was brought to it the secretariat would notify all members of the League of Nations. The arguments of both sides would be public unless the court accepted the contention of one of the parties that there were reasons justifying a private hearing. The actual deliberations of the court, as with the American Supreme Court, would be private, but the decision, which incidentally would be made by a majority of the judges, would be made in public session and immediately certified to all members of the League.

THE PROPOSED PERMANENT COURT OF INTERNATIONAL JUSTICE

PROJECT ADOPTED BY JURISTS ADVISORY COMMITTEE AT THE HAGUE; ALSO COVERING LETTER SENT BY THE COUNCIL OF THE LEAGUE TO ALL GOVERNMENTS MEMBERS OF THE LEAGUE

The following project was registered for publication September 15. The next day the Council of the League of Nations gave consideration to the project, and at its meeting at Brussels, in October, it will undoubtedly draft definite and favorable recommendations to the Assembly of the League at its meeting in Geneva, November 15. The important documents which follow will be of special interest to every friend of the American Peace Society.—THE EDITOR.

(The Covering Letter)

LEAGUE OF NATIONS

Permanent Court of International Justice

(21/5970/895.) (20/31/60.

SUNDERLAND HOUSE, CURZON STREET,
LONDON, W. I., *27th August,* 1920.

The Council of the League of Nations has the honor to communicate to the —— Government the scheme presented by the International Committee of eminent jurists who were invited to submit plans for the establishment of a Permanent Court of International Justice, and who have recently concluded their deliberations at The Hague.

The Council do not propose to express any opinion on the merits of the scheme until they have had a full opportunity of considering it, but they permit themselves to accompany the documents with the following observations:

The scheme has been arrived at after prolonged discussion by a most competent tribunal. Its members represented widely different national points of view; they all signed the report. Its fate has therefore been very different from that of the plans for a Court of Arbitral Justice, which were discussed without result in 1907. Doubtless the agreement was not arrived at without difficulty. Variety of opinions, even among the most competent experts, is inevitable on a subject so perplexing and complicated. Some mutual concessions are therefore necessary if the failure of thirteen years ago is not to be repeated. The Council would regard an irreconcilable difference of opinion on the merits of the scheme as an international misfortune of the greatest kind. It would mean that the League was publicly compelled to admit its incapacity to carry out one of the most important of the tasks which it was invited to perform. The failure would be great and probably irreparable; for, if agreement proves impossible under circumstances apparently so favorable, it is hard to see how and when the task of securing it will be successfully resumed.

It is in the spirit indicated by these observations that the Council on their part propose to examine the project submitted to them by the Committee of Jurists, and they trust that in the same spirit the members of the League will deal with this all-important subject when the Council brings the recommendations before the Assembly.

Signed on behalf of the Council of the League of Nations.

——, ——,

Secretary-General.